

\*E-Filed 8/10/11\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OSCAR PAYNE,

No. C 11-1431 RS (PR)

Petitioner,

**ORDER TO SHOW CAUSE**

v.

M.D. BITER, and  
KELLEY HARRINGTON,  
Respondents.

**INTRODUCTION**

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. The petition is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases. Petitioner has paid the filing fee.

**BACKGROUND**

According to the petition, an Alameda County Superior Court jury convicted petitioner of attempted murder, assault with a firearm, being a felon in possession of a firearm, and shooting at a vehicle. Consequent to the verdict, petitioner was sentenced to 55 years-to-life in state prison.

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## DISCUSSION

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A district court considering an application for a writ of habeas corpus shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

As grounds for federal habeas relief, petitioner claims that the trial court violated his due process rights when it admitted evidence of a prior conviction. Liberally construed, this claim appears to be cognizable on federal habeas review.

## CONCLUSION

1. The Clerk shall serve by certified mail a copy of this order, the petition and all attachments thereto, on respondents and respondents’ counsel, the Attorney General for the State of California. The Clerk shall also serve a copy of this order on petitioner.

2. Respondents shall file with the Court and serve on petitioner, within **ninety (90)** days of the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on petitioner’s cognizable claim. Respondents shall file with the answer and serve on petitioner a copy of all portions of the state trial record that previously have been transcribed and that are relevant to a determination of the issues presented by the petition.

3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the Court and serving it on respondents’ counsel within **thirty (30)** days of the date the answer is filed.

1           4. In lieu of an answer, respondents may file, within **ninety (90)** days of the date this  
2 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory  
3 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondents file  
4 such a motion, petitioner shall file with the Court and serve on respondents an opposition or  
5 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and  
6 respondents shall file with the Court and serve on petitioner a reply within **fifteen (15)** days  
7 of the date any opposition is filed.


8           5. Petitioner is reminded that all communications with the Court must be served on  
9 respondents by mailing a true copy of the document to respondents' counsel.

10           6. It is petitioner's responsibility to prosecute this case. Petitioner must keep the  
11 Court and respondents informed of any change of address and must comply with the Court's  
12 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
13 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14           7. Upon a showing of good cause, requests for a reasonable extension of time will be  
15 granted provided they are filed on or before the deadline they seek to extend.

16           **IT IS SO ORDERED.**

17           DATED: August 10, 2011

  
RICHARD SEEBORG  
United States District Judge